In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 957

JAMES FRED BAXA AND CLYDE CHURCH, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals is reported at 340 F. 2d 259 (Pet. App. 1–7).

JURISDICTION

The judgment of the court of appeals was entered on January 11, 1965. A petition for rehearing was denied on February 3, 1965. The petition for a writ of certiorari was filed on March 5, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the evidence supported the conviction of petitioners for possessing goods stolen from a

772-976—65

truck moving in interstate commerce and for conspiracy.

2. Whether the court committed reversible error in admitting inculpatory statements of a co-defendant.

3. Whether the court, in ruling upon an evidentiary motion, properly instructed the jury that the acts and statements of each defendants could be considered as evidence against all since the government had sustained its burden of connecting the testimony.

STATUTES INVOLVED

18 U.S.C. 659 provides pertinently:

> Whoever embezzles, steals, or unlawfully takes, carries away, or conceals, or by fraud or deception obtains from any railroad car, wagon, motortruck, or other vehicle, or from any station, station house, platform or depot or from any steamboat, vessel, or wharf, or from any aircraft, air terminal, airport, aircraft terminal or air navigation facility with intent to convert to his own use any goods or chattels moving as or which are a part of or which constitute an interstate or foreign shipment of freight or express; or
>
> Whoever buys or receives or has in his possession any such goods or chattels, knowing the same to have been embezzled * * *
>
> * * * * *
>
> Shall in each case be fined not more than $5,000 or imprisoned not more than ten years, or both * * *.

18 U.S.C. 371 provides pertinently:

> If two or more persons conspire either to commit any offense against the United States,

or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

* * * * *

STATEMENT

Petitioners and co-defendants Martin and Scheri were indicted in the United States District Court for the Southern District of Illinois for possessing and conspiring to possess goods stolen while moving in interstate commerce, in violation of 18 U.S.C. 371, 659 (A.A. 1–3).[1] Scheri pleaded guilty at the conclusion of the government's evidence (A.A. 50). The other three defendants were convicted. Petitioners Baxa and Church were sentenced to imprisonment for four years and three years, respectively (A.A. 4–5). Martin did not pursue an appeal (Pet. App. 2). The court of appeals affirmed, 340 F. 2d 259.

1. On October 1, 1961, a trailer of the Wilson Trucking Company, which contained Westclox products worth more than one hundred dollars disappeared in Chicago in the course of an interstate journey (A.A. 9–17). Some of the stolen items were recovered on December 14, 1961 at the parking lot of "Your Choice Discount Store" in Spring Valley, Illinois, an enterprise operated by co-defendants Martin and Scheri. Within the two-week period be-

[1] "A.A." refers to appellants' appendix, "G.A." to the government appendix and "Tr." to the trial transcript which the government is lodging with the Court.

fore that date, Baxa had been observed speaking to Martin on several occasions, once for about an hour. On December 13, about midnight, he had driven someone from the store to the residence of Martin and Scheri (A.A. 31, 36–37, 40–41, 47).

On December 14, at about 8:00 to 8:20 p.m., Baxa drove a 1954 Buick on to the parking lot, followed shortly afterward by Church, driving a 1958 Buick. Petitioners, after conversing briefly, entered the store and conferred with Martin in his office for about thirty minutes (A.A. 19, 26, 41, 46–47; G.A. 4). Scheri was summoned to the office, where he remained briefly and then came out with petitioners. Martin told Scheri to hurry up and help the gentlemen load (A.A. 46–47). Baxa and Scheri walked to the rear of the parking lot, while Church drove the 1958 Buick to the rear and parked it next to a Chevrolet panel truck. The three men then transferred a number of cartons with Westclox markings from the truck to the 1958 Buick. This car was then moved while Church brought up the 1954 Buick, which they started to load (A.A. 19–20, 26; G.A. 5–7).

At this juncture, several F.B.I. agents began closing in. Scheri was seen peeking in the direction of the approaching agents and then drawing back. One of the agents greeted petitioners by name but received no response (A.A. 42–45; G.A. 21). Replying to the agent's questions, Scheri said that he was helping load but did not know what it was he was loading. He said he was following orders but refused to say who had given them. Baxa admitted that the 1954 Buick belonged to him. Church said that he did not know

to whom the 1958 Buick belonged and that he was only walking through (A.A. 42; G.A. 22). Baxa was found to have $1,629.81 on his person (A.A. 44). The cartons were seized, and it was observed that their shipping labels had been removed (A.A. 13, 17; Tr. 73–74, 132).

Petitioners and Scheri were taken to separate cars. After their rights were explained to them, petitioners declined to make a statement. Scheri, however, declared that he was a partner in the store with Martin and William O'Connor, that he was loading merchandise and that the store had sent him. When asked by the agent exactly who had sent him, he said, "Well, I am in enough trouble now. I don't want to get anyone else into any trouble." When asked what he was doing moving stolen merchandise into another car, he said, "If you play the game, you have got to pay" and, later, "It's sure true what they say about crime doesn't pay" (A.A. 32). Petitioners objected to this testimony and moved to strike the conversation on the ground that it took place outside their presence (A.A. 32, 33).

Meanwhile, other agents had gone to the office of co-defendant Martin. Martin denied knowing that anyone was unloading anything from the store truck. He stated that he did not handle Westclox products.[2] At the invitation of Martin, the agents looked around the store and at a church used for storage, then returned to the parking lot. Accompanied by Martin, they went to each of the cars where the three other

[2] The store offered for sale other clocks and watches, not including Westclox (A.A. 31, 34).

defendants were seated. Martin identified Scheri as his partner in the store but denied ever having seen petitioners before; he specifically denied having seen petitioners in the store earlier in the evening. There was no objection to this testimony (A.A. 27; G.A. 9–12).

2. In the earlier part of the trial, the court overruled objections by petitioners and Scheri with regard to testimony. The court sustained or reserved ruling on similar objections by Martin on the ground that he had not been connected with the alleged conspiracy (A.A. 21, 26, 32, 35; G.A. 21). However, after testimony had been introduced that Martin talked with Baxa in the store about a week and a half or two weeks before the incident and again on the night before, after which Baxa had driven somebody from the store to the residence of Martin and Scheri, the court admitted all testimony in evidence against all defendants (A.A. 45). When the jury returned, the court told them (A.A. 45–46):

> Ladies and gentlemen of the jury, will you please give me your attention? From time to time objections have been made to testimony as to acts and conversations and statements being had or made by one or more of the defendants, but out of the presence of the other defendants.
>
> Now when objections were being made by defendant Baxa, defendant Church and defendant Scheri I overruled those objections at the time they were made. Now, when objections was made by the defendant Martin I sustained certain of those objections, and in the case of

some of the subsequent witnesses I reserved my ruling on the objection of the defendant Martin.

Having heard the testimony, I now rule that the government has sustained its burden of connecting the testimony, and at this time I therefore overrule each objection as to my ruling which reserved[2]—and overrule all of the objections that were sustained, and I now rule that the testimony relating to the acts and conversations and statements by the several defendants in each such instance is admissible, and admitted as evidence against all of the defendants whether or not each was present when such acts were done, such conversations were had or such statements were made.

I therefore instruct you that you may consider the testimony of the character above mentioned as evidence against each of the defendant; who were not then present as well as against those defendants who are shown by the testimony to have been then present and participating in such acts, statements and conversations.

All defendants objected to this ruling but none objected to the form of the instruction (A.A. 46).[3] The court, in its final charge to the jury, instructed them not to consider what others may have said or done

[2] The objections were as follows (Tr. 407–408):

Mr. Piragine. May I for the record make an objection on behalf of the defendant Martin?

The Court. Yes. The record may so show.

Mr. Cassidy. Sr. The defendant Scheri in his own behalf only joins in the objection.

The Court. Is that true of Mr. Baxa and Mr. Church?

Mr. O'Connor. Yes, your honor.

The Court. Yes. The record may so show.

in determining whether or not a defendant was a party to a common plan, but only what each defendant himself said or did. If membership in a common plan was so shown, then acts or statements of the other members in furtherance of the plan might be considered (G.A. 39–40, 42).

DISCUSSION

We have set forth the facts bearing upon each of the three legal issues presented by this case. In the view we take, however, there is no occasion for the Court to consider the sufficiency of the evidence and the correctness of the trial court's instructions (questions 1 and 3, *supra*). We are persuaded that petitioners are correct in their claim (question 2) that it was reversible error for the trial court to admit testimony regarding Scheri's self-incriminatory statements to the F.B.I. ("If you play the game, you have got to pay" and "It's sure true what they say about crime doesn't pay,") without instructing the jury that this testimony was to be considered only against Scheri and not against the other defendants.

The governing legal principles were accurately stated by the court of appeals but were incorrectly applied, we think, to the present facts for two reasons. First, it seems probable that, at the time these conversations took place, the conspiracy was at an end, since all of its members had been apprehended (if not formally arrested) by the F.B.I. Second, even if the conspiracy was still going on, Scheri's admissions were not "made pursuant to and in furtherance of [its] objectives." *Krulewitch* v. *United*

States, 336 U.S. 440, 442–443. There is no indication that the statements were made with a view to shielding Scheri's co-conspirators or throwing the investigators off the track. Thus, here, as in *Fiswick* v. *United States,* 329 U.S. 211, 217, "confession or admission by one co-conspirator after he [had] been apprehended [was] not in any sense a furtherance of the criminal enterprise." Accordingly, the testimony was inadmissible against Scheri's co-conspirators, none of whom was present at the time the statements were made. Petitioners were therefore entitled to a limiting instruction at the time the evidence was admitted and to an instruction directing the jury to disregard the testimony altogether when Scheri pleaded guilty at the end of the government's presentation.

Ordinarily we would urge that a case such as this be remanded to the court of appeals for a determination as to whether the erroneous evidentiary ruling, viewed in the context of the whole trial, was prejudicial. In this instance, however, we do not advocate such a course, for we are unable, in all candor, to deny the likelihood that the verdict may have been influenced by the improperly admitted statements. To be sure, Scheri's admissions did not refer to petitioners by name. But in view of the independent evidence linking the four defendants, we cannot say with "fair assurance" that the jury did not interpret them as indirectly implicating petitioners as well. *Kotteakos* v. *United States,* 328 U.S. 750, 764–765.

CONCLUSION

We accordingly believe that the petition should be granted and the cause remanded for a new trial.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.
FRED M. VINSON, JR.,
Acting Assistant Attorney General.
BEATRICE ROSENBERG,
KIRBY W. PATTERSON,
Attorneys.

MAY 1965.

U.S. GOVERNMENT PRINTING OFFICE: 1965